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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 UNITED STATES OF AMERICA *ex*
11 *rel.* DARRYN KELLY,
12
13 vs.
14 SERCO, INC., a New Jersey
Corporation, and DOES 1-5,
Defendant.

CASE NO. 11cv2975 WQH-RBB
ORDER

15 HAYES, Judge:

16 The matter before the Court is the Motion to Re-Tax Costs filed by Relator
17 Darryn Kelly. (ECF No. 106).

18 **I. Background**

19 On December 21, 2011, Relator Darryn Kelly, suing on behalf of the United
20 States, initiated this action against Defendant Serco, Inc. (“Serco”) based on the False
21 Claims Act (“FCA”) by filing a Complaint in this Court under seal. (ECF No. 3). On
22 August 9, 2012, the Court ordered the Complaint unsealed because the United States
23 declined to intervene. (ECF No. 8). On September 7, 2012, Relator filed a First
24 Amended Complaint (“FAC”). (ECF No. 11).

25 On April 21, 2014, Defendant filed a motion for summary judgment. (ECF No.
26 65). On October 6, 2014, the Court issued an order granting Defendant’s motion for
27 summary judgment. (ECF No. 82). On October 8, 2014, judgment was entered for
28 Defendant Serco and against Relator Kelly. (ECF No. 83). On October 22, 2014,

1 Defendant filed a bill of costs. (ECF No. 88). On November 4, 2014, Relator filed the
2 Motion to Preclude Recovery of Costs or Alternatively to Stay Clerk's Taxing of Costs
3 Pending Appeal. (ECF No. 90). On January 5, 2015, the Court denied the Motion to
4 Preclude Recovery of Costs or Alternatively to Stay Clerk's Taxing of Costs because
5 the Clerk of the Court had not yet taxed costs. (ECF No. 104). On January 6, 2015, the
6 Clerk of the Court held a hearing on Defendant's bill of costs. *See* ECF No. 105. On
7 January 13, 2015, the Clerk of the Court taxed costs in the amount of \$17,982.06 in
8 favor of Defendant. (ECF No. 105).

9 On January 20, 2015, Relator filed the Motion to Re-Tax Costs. (ECF No. 106).
10 On February 9, 2015, Defendant filed an opposition. (ECF No. 107). On February 13,
11 2015, Relator filed a reply. (ECF No. 108).

12 **II. Contentions of the Parties**

13 Relator requests an order re-taxing costs and ordering that the parties bear their
14 own costs. Relator contends that "Defendant's cost bill [of \$17,982.06] would be
15 devastating to Relator's financial well being." (ECF No. 106-1 at 4). Relator submits
16 a declaration stating that his income in 2013 was \$10,415, plus \$22,471 in
17 unemployment benefits. Relator states that he had to cash in his 401K for the period
18 he was unemployed, that he has less than \$2,000 in savings, and that he owns no real
19 property. Relator contends that the record in this case demonstrates that Defendant is
20 guilty of misconduct in performing its contracts with the United States Government by
21 reporting time in a fraudulent manner and failing to deliver the Earned Value
22 Management ("EVM") reporting that it contracted to provide. Relator contends that the
23 viability of his implied certification theory in this case was "at best, a close question"
24 or "inconsistent with 9th Circuit law." *Id.* at 6 (citing *Ebeid ex rel. U.S. v. Lungwitz*, 616
25 F.3d 993 (9th Cir. 2010)). Relator contends that an award of costs in this case would
26 run counter to the purposes of the FCA, which provides lucrative financial incentives
27 for private individuals to come forward to expose fraud on the federal government.

28 Defendant contends that Plaintiff's limited financial resources cannot overcome

1 the presumption that Defendant is entitled to its costs of \$17,982.06. Defendant
 2 contends that Plaintiff is currently employed. Defendant contends that courts have
 3 awarded costs to prevailing defendants in FCA cases because cost-shifting does not
 4 create a chilling effect on *qui tam* plaintiffs. Defendant contends that this Court already
 5 determined that Defendant was not guilty of misconduct in working with the U.S.
 6 Government when it granted Defendant's motion for summary judgment. Defendant
 7 contends that this was not a close case; Relator produced no evidence demonstrating
 8 that EVM reporting was material to the U.S. Government's decision to pay Defendant
 9 Serco.

10 **III. Discussion**

11 "Unless a federal statute, these rules, or a court order provides otherwise,
 12 costs--other than attorney's fees--should be allowed to the prevailing party." Fed. R.
 13 Civ. P. 54(d)(1). Costs may be awarded to a prevailing defendant in a *qui tam* action
 14 brought pursuant to the False Claims Act. *U.S. ex rel. Lindenthal v. Gen. Dynamics*
 15 *Corp.*, 61 F.3d 1402, 1414 (9th Cir. 1995) ("Because we conclude that section
 16 3730(d)(4) does not constitute an express provision regarding costs, we hold that the
 17 district court did not err in awarding costs under Rule 54.")

18 Federal Rule of Civil Procedure 54(d)(1) "creates a presumption in favor of
 19 awarding costs to a prevailing party, but vests in the district court discretion to refuse
 20 to award costs." *Ass'n of Mexican-American Educators v. State of Cal.*, 231 F.3d 572,
 21 591 (9th Cir. 2000) (en banc). "This discretion, however, is not without limits."
 22 *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1247 (9th Cir. 2014). "A district
 23 court must specify reasons for its refusal to award costs." *Id.* (quoting *Ass'n of*
 24 *Mexican-American Educators*, 231 F.3d at 591). "Appropriate reasons for denying
 25 costs include: (1) the substantial public importance of the case, (2) the closeness and
 26 difficulty of the issues in the case, (3) the chilling effect on future similar actions, (4)
 27 the plaintiff's limited financial resources, and (5) the economic disparity between the
 28 parties." *Id.* at 1247-48 (citation omitted). "This is not an exhaustive list of good

1 reasons for declining to award costs, but rather a starting point for analysis.” *Id.* at 1248
2 (internal quotations and citation omitted). “Although a district court must ‘specify
3 reasons’ for its *refusal* to tax costs to the losing party, we have never held that a district
4 court must specify reasons for its *decision* to abide the presumption and tax costs to the
5 losing party. The distinction is critical. A district court deviates from normal practice
6 when it refuses to tax costs to the losing party, and that deviation triggers the
7 requirement to ‘specify reasons.’” *Save Our Valley v. Sound Transit*, 335 F.3d 932, 945
8 (9th Cir. 2003) (citations omitted) (emphasis in original). *But see Stanley v. Univ. of*
9 *S. Cal.*, 178 F.3d 1069, 1080 (9th Cir. 1999) (holding that the district court abused its
10 discretion in declining to re-tax costs without considering the plaintiff’s indigency and
11 “the chilling effect of imposing such high costs on future civil rights litigants”). “Our
12 requirement that the court give reasons for denying costs is, in essence, a requirement
13 that the court explain why a case is not ‘ordinary’ and why, in the circumstances, it
14 would be inappropriate or inequitable to award costs.” *Ass’n of Mexican-American*
15 *Educators*, 231 F.3d at 593.

16 In this case, Relator has \$2,000 in savings, and liquidated his 401K in order to
17 pay for living expenses during his period of unemployment in 2013. Conversely, the
18 public vouchers submitted by Defendant Serco to the U.S. Government for payment
19 reflect that Defendant Serco collected upwards of \$5 million on the contracts at issue
20 in this case. *See* ECF Nos. 101-12, 101-13. The Court finds that an award of costs of
21 \$17,982.06 is not appropriate based upon Relator’s limited financial resources and the
22 economic disparities between the parties.

23 Relator proceeded on the theory that Defendant Serco implicitly falsely certified
24 compliance with EVM reporting requirements when it submitted claims for payment
25 by the U.S. Government. In opposing summary judgment, Relator submitted evidence
26 demonstrating that Defendant Serco did not comply with the EVM reporting
27 requirements of the contracts at issue in this case. In granting summary judgment to
28 Defendant Serco, the Court followed *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993 (9th

1 Cir. 2010) and concluded that, “[u]nder a theory of implied false certification, it is only
2 possible for a claimant to implicitly certify compliance with a law, rule, or regulation
3 if there is a relevant ‘statute, rule, regulation, or contract’ in place that conditions
4 payment of the claim on compliance with that underlying law, rule or regulation.”
5 (ECF No. 82 at 11) (citing *Ebeid*, 616 F.3d at 999-1001). After considering the
6 evidence submitted by Relator in opposition, the Court concluded that there was no
7 triable issue of fact as to whether Defendant Serco implicitly certified compliance with
8 EVM reporting requirements because there was no statute, rule, regulation, or
9 contractual term that conditioned Defendant Serco’s payment on compliance with EVM
10 reporting requirements. See ECF No. 82 at 12-16.

11 However, there is a circuit split on this very issue. Some circuits have taken the
12 same approach as the Ninth Circuit. See, e.g., *Mikes v. Straus*, 274 F.3d 687, 700 (2d
13 Cir. 2001) (“[I]mplied false certification is appropriately applied only when the
14 underlying statute or regulation upon which the plaintiff relies expressly states the
15 provider must comply in order to be paid.”). Other circuits have adopted an approach
16 recognizing implied false certification claims where the breach of the government
17 contract was material and committed knowingly. See, e.g., *U.S. ex rel. Hutcheson v.*
18 *Blackstone Med., Inc.*, 647 F.3d 377, 386-87 (1st Cir. 2011) (disagreeing with *Ebeid*,
19 reasoning that a rule that “only express statements in statutes and regulations can
20 establish preconditions of payment is not set forth in the text of the FCA[,]” and holding
21 that liability under the FCA will lie where “a defendant acted knowingly and the claim’s
22 defect is material”); *United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1269
23 (D.C. Cir. 2010) (holding that “to establish the existence of a ‘false or fraudulent’ claim
24 on the basis of implied certification of a contractual condition, the FCA plaintiff—here
25 the government—must show that the contractor withheld information about its
26 noncompliance with material contractual requirements” and holding that “[t]he
27 existence of express contractual language specifically linking compliance to eligibility
28 for payment may well constitute dispositive evidence of materiality, but it is not ... a


1 necessary condition”).

2 The Court concludes that this case is not “ordinary” and that it would be
3 “inappropriate” and “inequitable” to award costs to Defendant Serco in this case. *Ass’n*
4 *of Mexican-American Educators*, 231 F.3d at 593. Relator’s motion to re-tax costs is
5 granted. The Court orders that each party shall bear their own costs.

6 **VI. Conclusion**

7 IT IS HEREBY ORDERED that the Motion to Re-Tax Costs (ECF No. 106) is
8 GRANTED. The Order Taxing Costs (ECF No. 105) is VACATED. Each party shall
9 bear their own costs.

10 DATED: March 16, 2015

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12 **WILLIAM Q. HAYES**
13 United States District Judge
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